

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

66101

FILE: B-184831

DATE: October 31, 1975

MATTER OF: General Ship and Engine Works, Inc.

97588

DIGEST:

1. Where bid bond, submitted with properly executed bid, is signed by corporate agent whose authority to sign bond on behalf of corporation is questioned, accompanying bid may be considered for award since surety's obligation to the Government would not be affected by absence of authorized signature on bond.
2. Evidence required to establish authority of particular person to bind corporation is for determination of contracting officer, and record provides no basis for concluding that contracting officer incorrectly determined that agent was authorized to sign bid bond.

Invitation for bids (IFB) No. N62794-76-B-0003, issued by the Department of the Navy, solicited bids for specified topside repairs on a Navy destroyer. On August 20, 1975, six bids were received and opened. Bromfield Corporation submitted the low bid of \$1,308,170.73, while General Ship and Engine Works, Inc. submitted the second low bid of \$1,330,000. However, General Ship, alleging a deficiency in the bid bond submitted by Bromfield, has protested award of a contract to that firm.

The IFB contained a requirement that bids "must be accompanied by a bid bond or bid guarantee in the penal sum equal to 20 percent of the total price offered." Paragraph 10 of that section of the IFB entitled "General Terms and Conditions of Invitation For Bids Under Master Contract For Repair and Alteration of Vessels" provided that the bid bond must be on Standard Form (SF) No. 24 and that bids not accompanied by such bid bond or other permissible bid guarantee in the prescribed amount "shall be rejected without further consideration, except as otherwise provided in paragraph 10-102.5 of the Armed Services Procurement Regulation /ASPR/." Instruction No. 2 on SF 24 states the following:

"The full legal name and business address of the Principal shall be inserted in the space designated 'Principal' on the face of this form.

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The bond shall be signed by an authorized person. Where such person is signing in a representative capacity (e.g., an attorney-in-fact), but is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved, evidence of his authority must be furnished."

Bromfield's bid bond as submitted was signed "Dana A. Summerville," with "Bromfield Corporation" typed below the signature. In addition, the Bromfield corporate seal was affixed next to the signature. General Ship contends that the bid bond was not valid because Mr. Summerville was only a messenger rather than an officer of the Bromfield Corporation and the bid was not accompanied by evidence of Mr. Summerville's authority to sign the bond on behalf of the corporation as required by SF 24.

The Navy asserts that the bid may be accepted because Mr. Summerville was known to be an authorized representative of Bromfield and because evidence of his authority to sign the bid bond was furnished after bid opening. However, General Ship's position is that a bid bond must be valid on its face; that bid bond requirements are strictly construed and may not be waived by the contracting officer; that in the present case no evidence as required by SF 24 was furnished showing the authority of Summerville to act on behalf of Bromfield; that such evidence must be furnished before bid opening; and that if Bromfield's bid bond is found to be satisfactory it would afford the bidder "two bites at the apple."

We have consistently held that bid bond requirements must be considered a material part of the IFB and the contracting officer cannot waive the failure to comply with these requirements. See, e.g., 38 Comp. Gen. 532 (1959); 39 Comp. Gen. 60 (1959); 44 Comp. Gen. 495 (1965); 50 Comp. Gen. 530 (1971); 52 Comp. Gen. 223 (1972). However, we have stated that "we do not regard the instructions on the back" of SF 24 as the type of material bid bond requirements with which bidders must comply in order to be responsive. B-152589, October 18, 1963. Rather, since the purpose of the bond is to secure liability of a surety to the Government in accordance with the terms of the bond, 52 Comp. Gen. 223 (1972), the question presented in cases where bid bond requirements are not complied with is "whether the Government obtains the same protection in all material respects under the bond actually submitted as it would have under a bond complying completely with the instructions on Standard Form 24." B-152589, supra.

Obviously, where a bidder does not submit a required bid bond, the Government is not protected and the bid must be rejected. 38 Comp. Gen. 532, supra; 42 Comp. Gen. 725 (1963). A similar result is reached if the amount of the bond is insufficient, 39 Comp. Gen. 827 (1960); 40 Comp. Gen. 561 (1961), or if the bond names a principal other than a nominal bidder. A. D. Roe Company, Inc., B-181692, October 8, 1974, 74-2 CPD 194, and cases cited therein.

In other situations, however, we have held that the bidder's failure to comply with a requirement relating to execution of a bid bond did not require rejection of the bid because it appeared that the surety would be liable on the bond notwithstanding the bidder's deviation. In 39 Comp. Gen. 60, supra, we held that a date on the bond prior to the date on the bid itself, even though forbidden by a SF 24 instruction, did not affect the liability of the surety. In B-152589, supra, where a partnership was the bidder and only one partner signed the bond despite the SF 24 instruction requiring all partners to execute the bond, we held that the Government would be able to enforce the surety's obligation resulting from the partnership's contract with the surety and that the bid therefore could be considered for award. Other cases in which we found the surety's obligation unaffected by a bidder's deviation from stated requirements have involved a failure to affix the corporate seal to the bond, B-164453, July 16, 1968 and B-145301, April 21, 1961, and even a failure of the bidder to sign the bond at all. B-173475, October 22, 1971 and B-164453, supra.

The protester asserts that in this case the surety would not be liable on Bromfield's bid bond. In this regard, the protester has cited Stearns, The Law of Suretyship § 7.11 (5th ed. 1951), Simpson, Handbook on the Law of Suretyship 271 (1950), and Dole Brothers Co. v. Cosmopolitan Preserving Co., 167 Mass. 481, 46 N. E. 105 (1897), for the proposition that a surety is not liable on the bond executed by an unauthorized agent of the principal. In the Dole Brothers Co. case, which is relied upon by the above authors, the court held only that since the sureties did not actually know that the principal's agent was not authorized to sign the bond on behalf of the principal, "upon the face of the paper /bond/ * * * without more, /the sureties/ do not appear to be liable. * * * The instrument as delivered was not what it purported to be, and not what the sureties, if they judged from the instrument alone, must have supposed it to be. Without further proof they cannot be held upon it." 46 NE at 106.

We do not believe that the case is controlling in the instant situation. In 72 C.J.S. Principal and Surety § 24 (1951), it is stated:

"Want of authority of the person who executes an obligation as the agent or representative of the principal will not, as a general rule, affect the surety's liability thereon, especially in the absence of fraud, even though the obligation is not binding on the principal. This rule is especially applicable where there is no positive illegality in the contract, and where the surety was cognizant of the want of authority, or where it affirmatively appears that the principal is in fact indebted or under obligation to the creditor or obligee. A surety signing a partnership note has been held bound, although the note was signed by a member of the firm without authority." (footnotes omitted and emphasis supplied)

Additionally, section 7.9 of Stearns, supra, states in part:

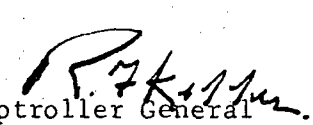
"Where the suretyship instrument recites that the principal is to sign it also, but the principal fails to do so, the courts are in disagreement as to whether the surety may plead the principal's failure to sign as a successful defense in an action by the creditor. A number of cases have held that the surety is not bound on the theory that the recital of the principal's name in the body of the instrument is notice to the creditor that the surety does not intend to be liable unless his principal signs. Where, however, the principal is liable without signing the bond, as where he has made a separate agreement with the creditor or he is liable by virtue of an office he holds, other courts have refused to relieve the surety of liability because of the principal's failure to sign the suretyship bond." (footnotes omitted, emphasis supplied)

In Dole Brothers Co., the court did not have for consideration any "further proof" such as a separate agreement establishing the principal's obligation to the creditor or obligee. Thus, the

court was necessarily concerned with protecting the rights of the surety in a situation where the surety might have had no recourse against the principal. As the court said, "Such an instrument is supposed to be signed by the sureties as a contract binding upon the principal as well as upon themselves. They may be presumed to rely upon the rights of the obligee to proceed against the principal, and upon their own right to recover from him under the instrument if they are compelled to pay for his benefit." 46 NE at 106. Here, however, there is a separate agreement, in the form of a bid, establishing Bromfield's obligation to the Government. Bromfield's bid, which was submitted with the bid bond in question, was signed by the President of Bromfield and, insofar as the record indicates, was proper in all other respects. Bromfield would thus be fully bound to perform upon acceptance of the bid. Furthermore, the bond itself, to which there was affixed the Bromfield corporate seal, contained the signature of the surety, identified the procurement to which it was applicable, and stated the appropriate penal amount. As indicated above, we have held that in similar cases, where the principal did not sign the bond at all, the surety's obligation was not affected thereby. B-173475, supra; B-164453, supra. Thus, it is our belief that under the circumstances existing here the weight of authority mandates the conclusion that the surety could not avoid its obligation under the bond.

In addition, we point out that while the above discussion is predicated on the assumption that Mr. Summerville was not authorized to sign the bond, it is far from clear that such is the case. The SF 24 instruction, while referring to "evidence" of a corporate agent's authority, does not specify what form such evidence may take. Here, the record indicates that Mr. Summerville was known to both the surety and the contracting agency as a representative of Bromfield. We also understand that Mr. Summerville carried the corporate seal with him, and both signed the bid bond and affixed the corporate seal thereto in the bid room prior to opening. It is conceivable that these facts could well be "evidence" of Mr. Summerville's apparent, if not actual, authority. In this regard, ASPR § 20-102(c)(1974 ed.) provides that the evidence required to establish the authority of a particular person to bind a corporation is for the determination of the contracting officer. We perceive no basis here for concluding that the contracting officer acted incorrectly in determining that Mr. Summerville was authorized to sign the bid bond on behalf of the corporation.

For the foregoing reasons, the protest is denied.


Deputy Comptroller General
of the United States